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No. 498

In the Supreme Court of the United States

OCTOBER TERM, 1931

TRANSIT COMMISSION AND STATE OF NEW YORK ET AL., ETC., APPELLANTS

v.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, AND THE INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 740) is not reported. The original report of the Commission, Division 4 (R. 29), is reported in 162 I. C. C. 363, its report on reargument (R. 59) in 166 I. C. C. 671, and its supplemental report (R. 72) in 175 I. C. C. 163.

JURISDICTION

The decree of the District Court was entered October 17, 1931. (R. 747.) Petition for appeal was filed October 19, 1931, and was allowed on the same day. (R. 749, 755.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

(1) Whether the order of the Commission authorizing abandonment of a portion of the Whitestone Branch of The Long Island Railroad Company is within the Commission's constitutional and statutory authority.

(2) Whether the finding of the Commission that present and future public convenience and necessity permit abandonment of a portion of the Whitestone Branch is supported by adequate evidence.

STATUTE INVOLVED

Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, provides in part:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of

a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. (C. 91, 41 Stat. 477, U. S. C., Title 49, Sec. 1 (18).)

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be aban-

doned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (19).)

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * * (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (20).)

* * * * * *

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (22).)

STATEMENT

This is a suit under the Act of October 22, 1913, to enjoin an order of the Interstate Commerce Commission certifying that the present and future public convenience and necessity permit the abandonment by The Long Island Railroad Company (hereinafter referred to as the Long Island) of 4.1 miles of its Whitestone Branch located in the Borough of Queens and within the City of New York. Identical petitions filed by the State of New York and by the Transit Commission (constituting the Metropolitan Division of the Department of Public Service of that State) were consolidated by the District Court. (R. 1, 107, 123.) The Interstate Commerce Commission intervened in opposition to both petitions. (R. 77, 107.)

The Long Island is a railroad which owns about 1,500 miles of track, chiefly on Long Island, and all within the State of New York. (R. 2, 278.) It operates both by steam and electricity. (R. 726 a.) Its principal revenue is from passenger traffic, which is almost wholly intrastate, but it also does a large freight business, 75 to 80 per cent of which is interstate traffic. (Ex. E, R. 142D, R. 450.) Its revenue from freight traffic for the years 1925 to 1928, inclusive, averaged over $11,000,000. (Ex. E, R. 142D.) In 1928 over 21% of its total operating revenue was derived from interstate commerce.[1] (*Infra*, p. 14.)

[1] Appellants (brief, pp. 19, 84) draw the unwarranted inference from *Eastern Class-Rate Investigation*, 164 I. C. C. 314, that the Long Island's freight traffic is unremunerative.

The Whitestone Branch is a single-track line, electrically operated, running from the Long Island's Port Washington Branch to the Flushing River and from there to Whitestone Landing, a distance of 4.7 miles. (R. 6, Map. R. 150.) On January 10, 1929, the Long Island filed with the Commission an application for a certificate authorizing abandonment of that portion of the Whitestone Branch from the west bank of the Flushing River to the terminus at Whitestone Landing. (R. 128–130.) The Transit Commission and others were permitted to intervene, and extensive testimony was taken before an Examiner of the Commission. (R. 30, 245–635.)

The revenue of the part of the branch sought to be abandoned, like that of the Long Island as a whole, is derived chiefly from intrastate passenger traffic, but it also transports a substantial quantity of freight (over 110,000 tons in 1928), 75% of which is shipped in interstate commerce. (Ex. F, Pt. 1, R. 142E, Ex. H, Pt. 1, R. 148A, R. 258.) There are five passenger stations on the branch, one in Flushing and four at points beyond Flushing. (R. 6.) Flushing is by far the largest of the five communities served by the branch. (R. 398.) In January,

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and "carried by the local passenger traffic." In that case the Commission found (pp. 441–443, 483) that less favorable transportation conditions on the Long Island entitled it to class rates higher than the level found reasonable for trunk-line territory as a whole. There was no suggestion that these higher rates would be unremunerative.

1928, a rapid-transit line built by the City of New York, connecting Flushing with the rapid-transit system of the Borough of Manhattan, was opened for service. (R. 651, Exs. 6 and 7, R. 686.) Following the opening of this line there was a 33% drop in the passenger revenue of the branch and its operating deficit, which was about $18,000 in 1927, increased to over $125,000 in 1928. (Ex. F, Pt. 1, R. 142E.) During the first five months of 1929 there was a further decrease in passenger revenue from the corresponding months of 1928 of over 26%, indicating an operating deficit for 1929 of at least $150,000. (*Infra*, p. 22.)

If the Whitestone Branch is to continue operations it will be required to incur a capital obligation of approximately $2,000,000 for the elimination of 12 grade crossings on the portion of the line sought to be abandoned. (*Infra*, p. 23.) The State and City of New York must also contribute an additional $2,000,000 of public funds toward the cost of removing these crossings. (R. 44, 732.)

Of the four communities beyond Flushing reached by the branch, two are served by a bus line and one (College Point) by a trolley line connecting with the city rapid-transit line. (*Infra*, pp. 27, 29.) The distance by bus or trolley to the rapid-transit line is from 2½ to 3½ miles. (R. 731.) The remaining community, the smallest (1925 population 2,291) and wealthiest of the three involved, has no regular bus or trollery service, but 75% of its residents prefer to use the Port Washington

Branch of the Long Island, which is less than 2½ miles away and which they reach in their own automobiles. (*Infra*, p. 28.)

Due to the fact that the tunnel under the East River and the facilities in the Pennsylvania Station, the Manhattan terminal of the Long Island, have for several years been used to capacity during commuting hours, there is a spread of almost an hour between the trains running from the Whitestone branch to the Pennsylvania Station during the period in the morning when service is most desired. (R. 417, Ex. 13, R. 730A.) This situation could be corrected only by taking away trains from other divisions of the Long Island which serve a much greater number of passengers than are carried by the Whitestone Branch. (R. 418.)

The busses which are running between Flushing and points on the Whitestone Branch are irregular, crowded, and illegally operated. (*Infra*, p. 29.) The improved service to be anticipated from operation under a franchise would tend to increase the branch's loss in traffic. A city Board in recommending in 1928 that the City of New York reject the Long Island's offer to quitclaim the Whitestone Branch said that the residents in the vicinity of the branch "can be speedily brought to rapid transit by buses and trolleys." (R. 649, 658.)

The Commission, Division 4, with these and other facts before it showing (1) few and widely separated trains on the Whitestone Branch, (2) lower fare and greater frequency of transportation by bus

or trolley connecting with the city rapid transit line, and (3) a progressive loss in passenger traffic on the branch since the opening of the city line to Flushing, found that the branch could not compete with the rapid transit system and bus lines and that transportation facilities in the area served by it were "in a state of transition" from the service furnished by the branch to the service by these other instrumentalities. (R. 29, 46–47.) It also found that the expenditure of about $2,000,000 to remove grade crossings, plus interest charges thereon and annual operating losses, would constitute a waste of money which would impose burdens upon both interstate and intrastate commerce. (R. 47.)

At the hearing before the Commission the Long Island offered, if it could obtain the necessary franchise, to furnish the communities affected by abandonment with a comprehensive bus service. (R. 259, 284.) It also proposed to establish a freight delivery yard and station in Flushing on the west bank of the Flushing River and to maintain freight stations, served by trucks, at two of the other communities on the branch. (R. 257–258.) The Commission, after a careful review of the evidence, found that present and future public convenience and necessity permit the abandonment requested—

> conditioned upon the establishment by the carrier, if it may lawfully do so, of adequate bus service between the points now served by the branch, excepting Bridge Street, Flushing, and the establishment of truck service

for less-than-carload freight traffic at College Point and Whitestone. (R. 47.)

Subsequently, on the request of the Transit Commission, there was a further hearing before the full Commission. (R. 59, 216.) The Commission filed its report on November 3, 1930, in which it said that the evidence, when reviewed in the light of the further argument, substantially confirmed the findings of the previous report. (R. 59, 67.) In order to meet the objection that the proviso attached to its previous certificate lacked definiteness and any provision for enforcement, the Commission said that it would postpone the effective date of the certificate "until such arrangement for substitute service is made or offered by the applicant as shall meet with our approval." (R. 68–69.)

On December 12, 1930, the Long Island filed an application for a bus franchise with the franchise-granting authority of the City of New York. (R. 82.) The application provided for 230 round trips a day between Flushing and two of the communities on the Whitestone Branch, 156 round trips a day between Flushing and a third community, and 78 round trips a day between Flushing and the community which was already connected with Flushing by trolley. (R. 91–94.) The fare proposed was 5¢; the company was willing to accept a franchise for any part of the routes for which it applied; it was also willing to accept a franchise or terminable permit for any length of time the city might specify. (R. 94.)

On May 12, 1931, the Long Island filed a petition with the Commission requesting that it be relieved of the obligation to furnish substitute service by buses and that the Commission fix an effective date for its certificate of abandonment. (R. 98, 103.) The petition alleged that the City had taken no action on the Long Island franchise application other than to refer it to the Board of Transportation for report, which Board had made no report. (R. 99.) The petition quoted a communication from a special committee of the franchise-granting authority to the Mayor of New York City, which, it was alleged, indicated that this body favored granting franchises for bus service to corporations other than the Long Island. (R. 100–103.) The Transit Commission replied to this petition without denying any of the specific allegations of fact made therein. (R. 228.)

On June 17, 1931, the Commission filed a supplemental report. (R. 72.) After reciting the allegations of the Long Island's petition and the contentions made in the reply of the Transit Commission, the Commission said that it was manifest "that the city is not disposed to accord that measure of cooperation which we had anticipated." (R. 72–76.) It said that nearly seven months had elapsed since the Long Island has approached the city with a request for a conference and more than five months since it had filed its application for a bus franchise. (R. 76.) It concluded that its order of April 10,

1930, should be effective 120 days from that date, and an order so providing was entered. (R. 76–77.)

The District Court filed an opinion holding that the Commission's order was supported by the evidence and was within its lawful authority. (R. 740.) It said (R. 746–747):

> In this instance the Commission's suggestion that a bus service be provided for, together with motor truck freight service to take the place of railroad transportation, meets with our approval. If the local authorities will grant the necessary franchises, the offer of the railroad company to meet the needs of the community should be accepted.

A decree was entered dismissing the bill. (R. 747–748.)

SUMMARY OF ARGUMENT

I. The Long Island is a railroad engaged in interstate commerce. Section 1 (18) of the Interstate Commerce Act provides that no railroad engaged in interstate commerce shall abandon a portion of its line without obtaining from the Commission a certificate that present and future public convenience and necessity permit such abandonment.

We submit that the constitutional and statutory authority of the Commission to enter the order which is here under attack is sustained by *Colorado v. United States*, 271 U. S. 153. That case upheld the constitutionality of these provisions as applied to the abandonment by an interstate carrier of a branch line wholly within a State. In that case

the Court pointed out that the sole statutory test prescribed is that abandonment be consistent with public necessity and convenience; that this test requires a balancing of the national interest not to have an interstate carrier burdened with excessive expenditures for the operation of a local line against the injury which abandonment will cause to the community affected; and that in this balancing the fact of demonstrated prejudice to interstate commerce is relevant and may be controlling, but is not requisite to the issuance of a certificate of abandonment.

II. The revenues of the Whitestone Branch are derived almost wholly from passenger traffic. The evidence amply sustains the findings of the Commission that service on the Whitestone Branch results in large operating losses; that, due to declining passenger traffic, these losses have been and will be progressive; that the branch can not successfully compete with transportation by buses and trolleys connecting with the city rapid-transit line; that the branch will eventually be supplanted by these instrumentalities; and that, if the branch is not abandoned, the Long Island will be required to incur a capital obligation of $2,000,000, representing its share of the cost of removing grade crossings on the branch. In finding that public convenience and necessity permit abandonment, the Commission considered all relevant factors, including the so-called "prosperity" of the Long Island.

ARGUMENT

I

THE ORDER OF THE COMMISSION IS WITHIN ITS CONSTITUTIONAL AND STATUTORY AUTHORITY

Section 1 (18) of the Interstate Commerce Act (*supra*, p. 2) provides that no railroad subject to the Act shall abandon any portion of its line until it has first obtained a certificate from the Interstate Commerce Commission that "the present or future public convenience and necessity permit of such abandonment." Section 1 (22) of the Act (*supra*, p. 4) exempts from this requirement spurs and industrial tracks and electric railways not operated as part of a general steam railroad system, but appellants do not contend that the present case falls within these exceptions.

The Long Island is a railroad engaged in interstate commerce subject to the Interstate Commerce Act. Unquestionably, therefore, the Commission had jurisdiction over the abandonment of its Whitestone branch, and this jurisdiction is exclusive. (*Colorado* v. *United States*, 271 U. S. 153, *supra*; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244.)

The interstate commerce of the Long Island is substantial. While its passenger traffic is almost entirely intrastate, from 75% to 80% of its freight traffic is interstate (R. 450), representing in 1928

over 21% of the railroad's total operating revenue.[2] Seventy-five per cent of the freight traffic on the Whitestone Branch is interstate commerce (R. 258) and in 1928 the part of the branch sought to be abandoned handled over 80,000 tons of freight moving in interstate commerce.[3]

Appellants nevertheless contend (brief, pp. 37–43, 84–87) that under Section 1 (18) the Commission is without power to authorize abandonment unless this course is necessary to protect interstate commerce against undue or unreasonable burdens. They seem to contend that abandonment can never be of public convenience and necessity unless it is shown that continued operation would unduly burden interstate commerce. The effect of their contention is that, while the Commission has jurisdiction to hear and determine all abandonment cases, it can not grant relief unless injury to interstate commerce from continued operation can be precisely and mathematically demonstrated.

We submit that this Court has held that the authority of the Commission is not so limited. In *Colorado* v. *United States, supra,* it sustained an order of the Commission permitting an interstate carrier to abandon a portion of its line located

[2] (1) 1928 freight revenue (Ex. E, R. 142D)..... $11,605,000
(2) 75% of (1)..... 8,704,000
(3) Total 1928 operating income (Ex. E, R. 142D).... 40,532,000
(4) Percentage which (2) is of (3)..... 21%

[3] In 1928, 111,700 tons of freight (75% of which is 83,775) originated or terminated on the branch. (Ex. H, Pt. 1, R. 148D.)

wholly within the State of Colorado. The State of Colorado, in opposing the order, contended (p. 166) that it was void because the Commission did not find that continued operation of the branch line would cause discrimination against interstate commerce, or prevent the carrier from earning a fair return on its property as a whole, or that the intrastate business in Colorado would not earn such a return on the property used in that business. In rejecting these contentions this Court held (1) that Congress could constitutionally give the Commission exclusive jurisdiction over the abandonment of an intrastate line of an interstate carrier, and (2) that the Commission's order in that case was supported by adequate findings and evidence.

The constitutionality of Federal control was sustained on two grounds, first, as a measure reasonably necessary to protect interstate commerce against injury, and, secondly, as the regulation of an instrumentality serving both interstate and intrastate commerce where Federal power, when exercised, was paramount. In connection with the first ground the Court said that losses incurred in the intrastate operation of a branch line might prejudice interstate commerce in many ways. Excessive expenditures from a common fund in the local interest might lessen the ability of the carrier properly to serve interstate commerce. Such expenditures might so weaken the financial condition of the carrier as to increase the cost of securing

needed capital; or they might compel the carrier to raise reasonable interstate rates, or to abstain from reducing such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce.

But constitutionality was also supported on "a broader basis." The Court said (p. 164):

> This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole.

The Court also referred to the fact that the validity of other provisions of the Transportation Act, 1920, rests upon recognition of the effect upon interstate commerce of the use of the same instrumentality in intrastate commerce, namely, the exclusive jurisdiction conferred upon the Commission over the issuance of securities and the recapture clause, as applied to surplus profits derived from intrastate operations.

In dealing with the findings and evidence necessary to support a valid order of abandonment, the Court said (pp. 167–168):

> While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate

> commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. *The sole test prescribed is that abandonment be consistent with public necessity and convenience.* In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. (Italics ours.)

The Court said that the statute ensures consideration of the local interests because the Commission, in abandonment cases, must notify the governor of the State concerned and afford the State authorities opportunity to represent before the Commission the rights and interests of the people of the State (Sec. 1 (19) of the Act, *Supra*, p. 3). The Court pointed out that the conflict in these cases is not so much between the needs of interstate commerce and those of intrastate commerce as it is between the importance to both not to be burdened by operating losses, on the one hand, and the extent to which abandonment would injure the communities affected, on the other hand. The fact of demon-

strated prejudice to interstate commerce is relevant and may be controlling, but the Act does not make issuance of the certificate "dependent upon a specific finding to that effect" (p. 169).

The abandonment provisions of the Interstate Commerce Act were added by the Transportation Act, 1920. This Court has repeatedly recognized that one of the fundamental purposes of that Act is to enable the Commission, in the interest of the public, to prevent waste and needless expense to the end that the carriers may earn enough to maintain their property and equipment in a high state of efficiency. In *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478, this Court referred to the power of the Commission to supervise the "abandonment of old lines" as one of the means by which this "great purpose" was to be achieved. In the *New England Divisions Case*, 261 U. S. 184, 190, the power to "authorize abandonment of unprofitable and unnecessary lines" was mentioned as prominent among the new provisions by which the "1920 Act sought to insure * * * adequate transportation service." In *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42, the Court said of the Commission's power over extension and operation of new lines (also conferred by paragraphs 18 to 22 of Section 1):

> Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvi-

dent and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service.

To interpret the statute to mean that no abandonment can be permitted unless it is affirmatively shown that operating losses on the line injure interstate commerce, is to render the Commission largely powerless. We submit that seldom, if ever, could the drain on a carrier's resources from the operation of an unprofitable branch line be traced through the multiplicity of railroad accounts so as to establish that this drain was the direct cause of injury or prejudice to interstate commerce. Decisions relating to the regulation of intrastate rates so as to prevent unjust discrimination against interstate commerce are not relevant because there the statute itself gives the Commission authority to act only if it finds that the intrastate rates in fact unduly injure or prejudice interstate commerce. Here the only statutory test is public convenience and necessity.

Colorado v. *United States*, 271 U. S. 153, *supra*, must now be regarded as settled law. Not only has the Commission been guided by it, but the lower Federal courts[4] have also frequently relied upon it.

[4] See *Missouri-Kansas-Texas Ry. Co.* v. *Northern Oklahoma Railways* 25 F. (2d) 689 (C. C. A., 8th); *U. S. Feldspar Corporation* v. *United States*, 38 F. (2d) 91 (D. C., N. D. N. Y.); *Pennsylvania R. R. Co.* v. *United States*, 40 F. (2d) 921 (D. C., W. D. Pa.); *Missouri Pac. R. R. Co.* v. *C. R. I. & P. Ry. Co.*, 41 F. (2d) 188 (C. C. A., 8th); *Southern Pac. Co.* v. *City of Willow Glen*, 49 F. (2d) 1005 (C. C. A., 9th).

The order of the Commission in this case does not interfere with exercise of the police power of the State to require elimination of dangerous grade crossings. Rather, by immediately stopping railway operation, it accomplishes the policy and purpose of the State more effectively than can the elimination program of the Transit Commission, which will take several years to complete.

II

THE FINDING OF THE COMMISSION THAT THE PRESENT AND FUTURE PUBLIC CONVENIENCE AND NECESSITY PERMIT ABANDONMENT OF THE WHITESTONE BRANCH IS SUPPORTED BY ADEQUATE EVIDENCE

The evidence established that service over the Whitestone branch was being conducted at a large operating loss and that continuation of the service would inevitably result in greatly increased losses.

The Whitestone is a single-track branch line of the Long Island serving Flushing and four communities beyond Flushing. (R. 6, Map, R. 150.) In January, 1928, a rapid transit line to Flushing, built by the City of New York, was opened for service. (R. 651.) The line is leased for operation to the Interborough Rapid Transit Company and to the New York Rapid Transit Corporation, the latter a subsidiary of the Brooklyn-Manhattan Transit Corporation, under contracts which require the lessees to carry passengers anywhere over their rapid transit lines for a 5¢ fare. (R. 409–410.) The opening of this line made available frequent service at a 5¢ fare to and from Flushing and all

parts of the Borough of Manhattan, the principal business section of New York City. Patrons of the Whitestone branch must pay more than twice this fare to reach Pennsylvania Station in New York and must depend upon a service which for commuting purposes, due to causes beyond the control of the Long Island, is very unsatisfactory. (*Infra*, pp. 25–27.)

The effect of the opening of the city rapid transit line to Flushing on the revenues of the Whitestone Branch was immediate and severe. In 1925 the branch had an operating income of about $16,000; in 1926 and 1927 it had operating deficits of about $13,000 and $18,000, respectively; but in 1928 the operating deficit was over $125,000. (Ex. F, Pt. 1, R. 142E.) Passenger revenue, in round figures, was $449,000 in 1926, $414,000 in 1927, and $277,000 in 1928, a decline from 1927 to 1928 of over 33%. (Ex. F, Pt. 1, R. 142E.) Since the revenue of this branch is derived almost entirely from its passenger traffic,* there was a decline in gross receipts corresponding to the loss in passenger revenue. The latest figures available are for the first five months in 1929. During these months the total passenger revenue of the branch was $96,181, as compared with $131,704 during the corresponding months in 1928, a further drop of over 26% after the 33% decrease from 1927 to 1928. (R. 39.) Although the

*For the years 1925 to 1928, inclusive, out of total operating revenue of about $1,665,000, about $1,584,000, or over 95%, was passenger revenue. (Ex. F, Pt. 1, R. 142E.)

same percentage decrease, if it continued throughout the year, would make the 1929 passenger revenue about $75,000 less than in 1928, the railroad conservatively estimated its 1929 operating loss at $150,000, an increase over 1928 of $25,000. (R. 254.)

But the burden on the Long Island, if service on the Whitestone branch must be continued, is not measured alone by the prospective operating losses thus indicated. The Transit Commission, a branch of the Department of Public Service of the State of New York, is vested with authority to require the elimination of grade crossings in New York City, and it has announced a program which will require the removal of the 12 grade crossings on the Whitestone branch. (R. 151, 250.) Under the law the Long Island must pay one-half the expense of removing these crossings. (R. 732.) The railroad's estimate of its share of this cost differed somewhat from that of engineers of the Transit Commission, but the Interstate Commerce Commission adopted the figure of $2,000,000 as representing the approximate amount which the Long Island would be required to pay and appellants do not seem to question this figure. (R. 43–44, 47, 67.) Since the law provides for loans to railroads by the State of New York for grade-crossing elimination purposes at the same rate of interest paid by the State on its elimination bonds, the Commission found that the interest charge to the Long Island would be 4½%, or approximately $90,000 a year. (R. 44.) In ad-

dition, the railroad would incur a $2,000,000 obligation which it would ultimately have to retire.

Since the part of the Whitestone Branch which the Commission's order authorizes the railroad to abandon is 4.1 miles long (R. 31), the Long Island, if operation must be continued, will be required to make a capital expenditure of approximately $500,000 a mile. This expenditure will save about $37,300 per annum on account of grade-crossing protection, less any increased expense for maintenance of the structures built over existing streets and taxes on the improvements and plus any savings on crossings accident; otherwise the expenditure will be entirely unproductive. (R. 477–478.) On December 31, 1928, the total value of the land and improvements thereon of the part of the branch sought to be abandoned, based on cost of reproduction new as of June 30, 1916, plus or minus additions and retirements from that date to December 31, 1928, was less than $1,000,000. (Ex. B, 142A.) Continuance of operation will, therefore, require an additional investment of $4,000,000 (of which the State of New York will contribute 49% and the City of New York 1%, R. 732) on a line all the fixed assets of which could be reproduced for about $1,000,000.

Furthermore, there is every probability that within a ten-year period the Whitestone Branch will suffer such loss of traffic to other forms of transportation that prohibitive operating losses,

coupled with the availability of adequate transportation by other means, will then require abandonment of the branch. (*Infra*, pp. 30–32.) If this results, continued operation will mean that, in addition to annual operating losses of at least $150,000 and annual interest charges (less the saving in operating expense) attributable to the cost of removing grade crossings, the Long Island will have an annual amortization charge over a ten-year period of $200,000, or a total annual drain on its resources approximating $400,000. The Vice President of the Long Island in general charge of that system was therefore speaking conservatively when he estimated that within five or ten years the railroad's loss on the branch would be $1,000 a day. (R. 248, 259.)

The unsatisfactory character of the branch's commuting service and the short distance of other rapid transit lines from the communities which it serves point to an almost certain increase in the branch's loss in passenger traffic from which, as previously stated (*supra*, p. 22), 92% of operating revenue is derived.

Since 1920 there have been only 24 trains a day running into Pennsylvania Station on week days from the Whitestone Branch.[6] (R. 609.) But from the commuter's standpoint the time of arrival of morning trains has been an even greater draw-

[6] In February, 1929, the schedule was reduced by one train. (R. 609.)

back than the average of only one train per hour. Those working in Manhattan have the choice of three morning trains, one leaving Whitestone Landing at 7.09 A. M., one at 7.34 A. M., and one at 8.29 A. M. (Ex. 13, R. 730A.) The scheduled arrival of these trains in Pennsylvania Station is 7.42 A. M., 8.12 A. M., and 9.09 A. M., respectively. (Ex. 13, R. 730A.) There was testimony that the train scheduled to arrive at 9.09 A. M., which requires a change at Woodside, nearly always arrived between 9.15 A. M. and 9.20 A. M. (R. 490) so that those using this train could not hope to arrive at their places of work much before 9.30 A. M. Due to the interval of practically an hour during the period when service is most required, patrons of the branch who have to arrive at offices in Manhattan by 9 o'clock are required to leave Whitestone Landing at 7.34 A. M., Whitestone at 7.37 A. M., Malba at 7.40 A. M., and College Point at 7.44 A. M. (Ex. 13, R. 730A.) Real-estate dealers testified that if a prospective buyer sees a time table the sale is lost. (R. 519, 527.)

The number of Long Island trains which can enter or leave Pennsylvania Station in Manhattan is limited by the capacity of the tunnel under the East River and by the terminal facilities of the Station. (R. 417.) During commuting hours these are being used to capacity. (R. 417.) The Transit Commission has power to regulate intrastate railroad passenger service in New York City, but the Chief of its Service Bureau, although he recognized

that the interval between trains in rush hours made the service on the Whitestone Branch unsatisfactory, did not recommend an increase in the service. (R. 397, 416–417.) He testified that service during the peak rush hours is now divided as equitably as possible between the different divisions of the Long Island, based on their traffic, and that any addition in the service given on the Whitestone Branch would mean taking away a train from some other division where traffic is a great deal heavier. (R. 418.)

The fare on the trolley which runs between College Point and the city rapid-transit station in Flushing is 6¢ (R. 400), making the fare 11¢ by trolley and subway to any part of Manhattan. To reach any part of Manhattan other than the vicinity of Pennsylvania Station a commuter using a 60-trip ticket must pay 13½¢ to the Long Island (R. 403) and a 5¢ subway fare from the Pennsylvania Station, so that for a round trip the additional cost by the Whitestone Branch is 15¢. There are at least three factories located in College Point (R. 531, 533–534), and the people living there seem to be of very moderate means. (R. 286.) The difference in fares of 15¢ a day may therefore be a real factor. The one-way fare on the Whitestone Branch from College Point to Pennsylvania Station is 40¢ (R. 402), or 29¢ more than the fare by trolley and subway. On the other hand, the running time by the Whitestone Branch is about 34 minutes shorter than by trolley and subway. (R.

402.) Inauguration of express service on the city line to Flushing would make the difference in running time about 27 minutes.[1] (R. 415.) The New York 1925 census showed the population of College Point to be 13,127, and a witness in that community estimated its present population as between 23,000 and 25,000. (R. 557, 674.)

Malba is a highly restricted residential community, having a population in 1925 of about 2,300. (R. 136, 265.) At the present time it has no bus or trolley service. Notwithstanding this fact, the service on the Whitestone Branch is so unsatisfactory that not more than 25% of the residents of Malba use this branch; the others go in their own automobiles to the Main Street station, Flushing, of the Port Washington Branch of the Long Island. (R. 568.) This station, which adjoins the Main Street Station of the city rapid-transit line (Map, R. 150), is 2.3 miles by auto road from Malba. (R. 89, 92.)

After the Commission's report of November 3, 1930, in which it said that it would postpone the effective date of its certificate of abandonment until the Long Island had arranged for substitute service which met the Commission's approval, the Long

[1] The city line to Flushing has three tracks, the third track not now being used except for the storage of empty cars. (R. 411–412.) The use of the third track for express service has been prevented by the unwillingness of the Interborough Rapid Transit Company to install signals on the third track and to furnish the necessary operating equipment. (R. 413–414, 631–632.)

Island applied for a bus franchise. (R. 68–69, 86.) It offered to operate buses seating 29 passengers on a 5¢ fare under the form of franchise previously adopted by the franchise-granting authority of the City of New York, the Board of Estimate and Apportionment, and to accept a franchise for any period of time the Board might specify. (R. 94–95.) Included in the service offered was one between Malba and Flushing with 78 round trips a day. (R. 92–93.) It also offered to establish a local service between Whitestone, Malba, and College Point with 4 trips each way per hour during the morning and evening rush hours and 2 or more trips each way per hour during nonrush hours, according to the demands for the service. (R. 93.) Its offer included an alternate route from Malba through College Point to Flushing with 78 round trips a day. (R. 93–94.)

Whitestone and Whitestone Landing (also called Beechhurst) are both residential communities with a combined population in 1925 of about 5,500. (R. 32, 674.) There is at present a bus line running between these points and Flushing and charging a 5¢ fare, but the company holds no franchise and its operations could be stopped at any time. (R. 425.) It is not surprising that under the circumstances service is very irregular and the bus is extremely crowded. (R. 515–519, 601, 621.) The Long Island's franchise application offered service between Flushing and Whitestone Landing (including Whitestone) with 230 round trips a day. (R. 91–92.) Thirty-six buses would leave for Flushing

between 7 and 9 o'clock in the morning with a seating capacity for over 1,000 passengers, or almost one-fifth of the entire population of these communities. (R. 91–92, 674.) The length of the proposed route is 3.5 miles. (R. 88.)

Appellants (brief, p. 82) refer to the fact that the highway from Whitestone to Flushing is narrow and contains dangerous curves. But these difficulties could be removed by the expenditure of a fractional part of the $4,000,000 which would be required to eliminate grade crossings on the Whitestone Branch.

The foregoing facts indicate, we believe, that if the Whitestone Branch continues to operate it will within the near future be unable to meet the competition of transportation by buses connecting with the city rapid transit line and the Port Washington Branch of the Long Island. Those who prefer to commute by the Long Island can reach the Port Washington Branch by a short bus ride and obtain the advantage of its more frequent service; it appears that three-fourths of the residents of Malba choose to ride by that branch at the present time even without any connecting buses. (R. 568.) Those who wish more frequent service than the Long Island can offer or who are influenced by the factor of lower fares will use buses and the city rapid transit line. From Whitestone the difference in fares would be about 20¢ a day,[8] a saving

[8] By bus and city line, 20¢ a round trip; by Whitestone Branch and subway from Pennsylvania Station, 39⅓¢ a round trip. (R. 522.)

of over $1.00 a week, and a resident of Whitestone testified that 75% of the people there were lucky if they got $35 to $40 a week. (R. 521.)

It is not unlikely that adequate bus connections with the two forms of near-by rapid transit (the city line and the Port Washington Branch of the Long Island) would furnish better transportation than the present unsatisfactory service on the Whitestone Branch. Whatever the cause for the delay by the City of New York in granting a bus franchise, or bus franchises, for the Borough of Queens, eventually such a franchise, or franchises, must be granted. Certainly the city's inaction can not be allowed to interfere with the determination of public interest and convenience by the Interstate Commerce Commission and the courts. To supply the needs of the community if operation of the Whitestone Branch is discontinued, the Long Island has stated its willingness to take a bus franchise terminable "at any time upon short notice" although it estimated the cost of the necessary equipment and garage at $350,000. (R. 94-95.) No conditions of any kind were attached to the Long Island's franchise application.

The action taken by the City of New York on the Long Island's offer to quitclaim the Whitestone Branch to the city is significant. On July 13, 1926, the company offered to the city, not only the branch line but also about 20 acres of shore property and the railroad's pier at Whitestone Landing, and it

offered to operate buses if the city so desired. (R. 636–638.) The offer was referred to the Board of Transportation of the City of New York. (R. 649.) On June 5, 1928, that Board, after a five weeks' study by its assistant counsel, assisted by employees of the Board, recommended that the offer be rejected for the reason, among others, "that residents of the vicinity can be speedily brought to rapid transit by buses and trolley cars." (R. 348, 649, 658.)

The evidence to which we have referred, including the decline in passenger traffic on the Whitestone Branch, fully supported the Commission's findings that this branch, "can not compete with the rapid transit system and bus lines" and that—

> the transportation facilities in the area served by the branch are now in a state of transition from the service furnished by the applicant to service by those instrumentalities. (R. 46–47.)

Appellants do not contend that in respect of freight the evidence does not fully support the Commission's finding that present and future public convenience and necessity permit the abandonment of the Whitestone Branch. At present one freight train a day operates over the branch. The Commission described the arrangements which the Long Island proposed for handling freight, in the event of abandonment of service on the line, as follows (R. 32–33):

> The applicant proposes to enlarge its freight yard west of Flushing at a location known as Corona Meadows, and expects to effect delivery and receipt of carload traffic on team tracks at that point. It also proposes to continue freight depots at College Point and Whitestone for receipt and delivery of less than carload freight, and this traffic will be handled between the depots and the freight yard by trucks operated by the applicant.

The so-called "prosperity" of the Long Island was considered by the Commission as one of the factors bearing upon the public convenience and necessity involved in permitting abandonment. In its first report it set forth details of the company's income account for the years 1925 to 1928, inclusive. (R. 36–37.) In its second report the Commission noted that the Long Island was prosperous and that it was controlled by the Pennsylvania Railroad Company, "which is well known to be among the strongest railroad systems of the country." (R. 66.) It nevertheless found that, considering all the circumstances before it, the burden of continued operation would be unnecessary and unreasonable, and said (R. 67):

> While it is true that loss from operation of a portion of a railroad system will not in every case justify the abandonment of such operation, it is also true that circumstances may justify the abandonment of an unprofitable line notwithstanding the prosperity of

the system as a whole. The circumstances of each case must govern its disposition.

In *Colorado* v. *United States*, 271 U. S. 153, 169, *supra*, this Court said that the prosperity of the carrier, when it seeks authority from the Commission to abandon a branch of its line, is relevant and may often be controlling in determining public convenience and necessity, but that it is not necessarily controlling. The State of Colorado, in its argument in that case, stated (155) that the railroad which was seeking to abandon a portion of its line had "for seven years enjoyed an average annual net operating income of practically $2,450,000."

The District Court, in sustaining the order of the Commission, said (R. 746):

> We think the Commission has acted cautiously and prudently and has given full opportunity to all parties in interest to be heard, and upon consideration of the evidence have had due regard for the welfare of the communities immediately affected.

The record upon which the Commission acted was complete in every respect. In addition to the extensive oral testimony that was given, there was introduced in evidence the reply filed by the Long Island to a questionnaire addressed to it by the Commission. (R. 242.) The reply gives the following information: history of the Whitestone Branch; its investment cost; the Long Island's general balance sheet; its income account for the years 1925 to 1928, inclusive; the income account of the Whitestone Branch for these years; a statement

showing the probable effect of continuing operation upon the Long Island's earnings as a whole; the population of the territory involved and its distance from any other railroads; a detailed description of the tonnage handled by the branch and the nature of the industries in tributory territory; details of its passenger traffic for the years 1925 to 1928, inclusive; the reasons for the recent decrease in traffic; efforts to dispose of the branch; and the reasons relied upon in support of the application for abandonment. (R. 131–148E.)

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CHARLES H. WESTON,
HAMMOND E. CHAFFETZ,
Special Assistants to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission,
EDWARD M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission,
Of Counsel.

NOVEMBER, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931